IN THE SUPREME COURT OF TEXAS

NO. 96-1026

JOHN VERBURGT, INDIVIDUALLY AND A/N/F OF THOMAS VERBURGT, TIMOTHY VERBURGT AND JOSEPH VERBURGT, PETITIONERS

v.

PATRICIA M. DORNER AND THE METHODIST MISSION HOME, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued on April 24, 1997

JUSTICE ENOCH, joined by JUSTICE ABBOTT and JUSTICE HANKINSON, dissenting.

From today forward, one need no longer timely appeal to invoke an appellate court's jurisdiction. But just two months ago, this Court retained the longstanding rule that only a timely filed appeal invokes appellate jurisdiction.[1] We insisted that to perfect appeal in a civil case, the notice of appeal *must* be filed within the time prescribed in the rules. *See* TEX. R. APP. P. 26.1. Further, we insisted that to extend the time in which to file the notice of appeal, one must file *not only* the notice of appeal, *but in addition "*a motion" that "*must* state: . . .[among other things] the facts relied on to reasonably explain the need for an extension." TEX. R. APP. P. 26.3, 10.5(b)(1)(C). Like our new rules, the plain language of the rule that applies to this case, Rule 41(a)(2), mandates that the appeal be timely; consequently, it compels the result the court of appeals reached in this case. Is this a bad result? For the hopeful appellant, perhaps (assuming that the appeal is, in fact, meritorious). But denuding the Court's rules to achieve the Court's chosen result is bad law. I dissent.

[1] In addition, we specifically stated that while other appellate rules may be suspended from time to time for good cause, "an appellate court may . . . *not* . . . alter the time for perfecting an appeal in a civil case." TEX. R. APP. P. 2 (emphasis added).

Rule 41(a)(2) permits a party who fails to timely appeal to seek an extension of time. But to do so, the party has to file, within fifteen days of the original due date, *both* the cost bond *and* a motion for extension of time reasonably explaining the need for the extension. The majority's holding, that an "implicit motion" is filed if a would-be appellant files late and files only a cost bond, ___ S.W.2d at ___, simply ignores the rule's requirement that *both* instruments must be filed. Moreover, Rule 41(a)(2) gives the court of appeals discretion whether to allow an extension of time, but this discretion is triggered only by the filing of a motion reasonably explaining the need for the extension. In the absence of a motion, the court of appeals' discretion is never invoked and the late-filed cost bond has no effect. Here, Verburgt did not file a motion to extend time, and he did not file the cost bond timely. He simply did not do what Rule 41(a)(2) clearly requires.

The Court does not cite a single case holding that the untimely filing of an appeal can still be a *bona fide* attempt to invoke the court of appeals' jurisdiction. To the contrary, we have consistently and routinely held that the appeal must be filed timely. *See Davies v. Massey*, 561 S.W.2d 799, 801 (Tex. 1978) ("Filing a cost bond . . . is a necessary and jurisdictional step in perfecting an appeal."); *Glidden Co. v. Aetna Cas. & Sur. Co.*, 291 S.W.2d 315, 318 (Tex. 1956) ("It is well settled . . . that the requirement that the bond be filed within thirty days is mandatory and jurisdictional."). Indeed, the court of appeals' decision in this case is predicated on this crucial point:

> [W]hile the supreme court has liberally construed the rules regarding the instruments necessary to confer jurisdiction, we do not discern a retreat in that court from the fundamental requirement that in order to invoke the jurisdiction of the court of appeals, some instrument, whether or not it is the correct instrument, must be timely filed.

928 S.W.2d at 656 (explaining two decisions on which the Court relies today: *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994) and *Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991)); *see also Olivo v. State*, 918 S.W.2d 519, 524 (Tex. Crim. App. 1996) (correctly noting that the "liberal policy" espoused by this Court in *Linwood* and

Grand Prairie "concerns the substitution of a correct instrument for an incorrect instrument, *which has been timely filed*").

I agree with the majority that "appellate courts should not dismiss an appeal for a procedural defect whenever any *arguable interpretation* of the Rules of Appellate Procedure would preserve the appeal ." ___ S.W.2d at ___ (emphasis added)(citing *Linwood* and *Grand Prairie*).[2] But surely that interpretation must be *arguable*. Interpreting Rule 41(a)(2) in contradiction to its plain language is not arguable; indeed, it is remarkably harmful to the concept of justice.

Under any number of circumstances, time plays a critical role in justice. For example, statutes of limitation and repose exist to ensure that claims are made in a timely fashion. *See, e.g., Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263 (Tex. 1994) ("We start with the unassailable premise that statutes of limitation, in general, serve a public function. They 'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds.'") (quoting *Robinson v. Weaver*, 550 S.W.2d 18, 20 (Tex. 1977)). Timely exercise of one's appellate rights is no less significant to predictability, and consequently, to justice. Failure to timely file an appeal has always been a *jurisdictional* error that precludes an appellate court from reaching the merits. *See Davies*, 561 S.W.2d at 801; *Glidden*, 291 S.W.2d at 318. It rightfully should remain so.

The majority's flawed reasoning is also apparent from the cases it cites. In *Linwood* and *Grand Prairie,* we held that a party's *bona fide* attempt to invoke the appellate court's jurisdiction will preserve its appeal. What is clearly apparent in these opinions is that the procedural defect, which rendered the party's effort at appeal only a *bona fide* attempt, was correctable. Concomitantly,

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[2] In fact, the thrust of our new rules is to eliminate the procedural traps often encountered under our former rules. *See* Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither, in* MATTHEW BENDER C.L.E., PRACTICING LAW UNDER THE NEW RULES OF TRIAL AND APPELLATE PROCEDURE 1-12 (Nov. 1997) (explaining that the 1997 revisions to the rules of appellate procedure "are meant to take the traps out of TRAP"). In its understandable zeal to get rid of "traps," however, the majority unfortunately has lost sight of the significant concept of timeliness as a prerequisite to proper invocation of the court of appeals' jurisdiction. As indicated above, even the new rules of appellate procedure require, as they must, that a party must be *timely* to invoke the court of appeals' jurisdiction.

the hopeful appellant had the obligation to correct this defect. But how would one correct untimeliness? One can't. Neither of these cases remotely signals a retreat from the principle that a party must *timely* appeal to invoke the court's jurisdiction.

The majority responds to my criticism by claiming that its decision "does not indefinitely extend the time in which parties may perfect an appeal" because parties supposedly "will still know within the time specified in Rule 41(a)(2) whether their opponents will seek to perfect an appeal." ___ S.W.2d at ___. My colleagues demonstrate that they do not understand what they do. The "indefiniteness" has nothing to do with not knowing whether an appeal will be filed within thirty days or forty-five days. It has everything to do with not knowing when the Court will simply "imply" a condition that never occurred to reach the result it prefers. When next will the Court "imply" filings that were never made? If the clear language of its own rules does not constrain the Court, then what will? If this is not "indefinite," then perhaps I do not understand the meaning of the word.

Finally, the majority mistakenly believes that ignoring its own rules somehow enhances "fairness." Playing by the rules is fair. Changing the rules to produce a particular result is not.

The judgment of the court of appeals should be affirmed. I dissent.[3]

Craig T. Enoch
Justice

OPINION DELIVERED: December 4, 1997

[3] Like Justice Baker, I also dissent to *Verburgt*'s companion cases. *See Harlan v. Howe State Bank*, ___ S.W.2d ___ (Tex. 1997); *Holmes v. Home State County Ins.*, ___ S.W.2d ___ (Tex. 1997); *Boyd v. American Indem. Co.*, ___ S.W.2d ___ (Tex. 1997) (Justice Hankinson, who joins me in this dissent, is not sitting in *Boyd*, and therefore joins this footnote only as it relates to *Harlan* and *Holmes*).